

CrossFit Gets Rival's Injury Data Declared False In Ad Row

By **Brandon Lowrey**

Law360, Los Angeles (September 21, 2016, 6:56 PM EDT) -- A National Strength and Conditioning Association article criticizing the CrossFit exercise program contained false data on injuries among CrossFit practitioners, a California federal judge ruled Wednesday in a false advertising lawsuit against the nonprofit.

U.S. District Judge Janis L. Sammartino found that a part of the nonprofit's article suggesting 16 percent of participants in a CrossFit Inc. training program couldn't complete the course because of "overuse or injury" was false. CrossFit offered the court declarations from most of the individuals who had dropped out of the program, and found that they either weren't injured and dropped out for some other reason, or had suffered health problems unrelated to CrossFit.

"CrossFit has presented evidence showing the injury data were in fact false — regardless of whether the authors knew it at the time — and the NSCA has identified no evidence to the contrary," Judge Sammartino wrote.

The suit centers on an article the NSCA published in its *Journal of Strength and Conditioning Research* in 2013 that contained a passage suggesting CrossFit poses an injury threat, a later study that purportedly quantified these injury risks and a 2015 correction saying the data in the first study was flawed.

Posing the NSCA as a competitor, CrossFit filed suit against the association in 2014, accusing it of publishing the data to turn potential members away from CrossFit and toward the strength coaches and personal trainers whom it certifies and trains for hefty fees. CrossFit claimed the data had since been discredited, which the NSCA conceded in a 2015 correction and its memo Wednesday.

The NSCA had argued that CrossFit's Lanham Act and California false advertising and unfair competition claims are barred — regardless of the data's accuracy — by the First Amendment and several federal decisions, most notably *Gordon & Breach*.

In that 1999 decision, the Ninth Circuit ruled in order for speech to be considered commercial, it must be made by a "defendant in commercial competition with the plaintiff ... for the purpose of influencing consumers to buy defendant's goods or services." This covers both traditional advertisements and more informal "promotion" that is sufficiently disseminated to the relevant purchasing public.

The NSCA argued this test has routinely found information published in scholarly journals like the *JSCR* to be noncommercial speech and therefore protected from suits under the First Amendment.

"These cases establish that simple publication of a scientific article is not actionable because it is not 'commercial speech' under the First Amendment," the NSCA said.

The NSCA also attacked CrossFit's California false advertising claim on statutory grounds, claiming it would only apply had the NSCA been promoting its own goods and services, which it did not.

The complaint also includes claims of trade libel and a push for declaratory relief. The NSCA argued the former should be dismissed because CrossFit has failed to provide concrete details on the business it claims it lost because of the article, and that the latter should be tossed because it relies on its other causes of action.

In her order on Wednesday, Judge Sammartino tossed CrossFit's declaratory relief claim, calling it "superfluous," and rejected the NSCA's contention that its commercial and noncommercial speech in the article were inextricably intertwined.

She said there was evidence that the injury data was known to be false, and that the NSCA stood to gain from the data's publication.

"Although they appear in the same article as speech deserving greater First Amendment protection, assuming the injury data were false and injected into the article to deride CrossFit's product, it would have been easy enough to publish an article with data that were not made up, and one could easily imagine the [study] without the statements premised on these false data," the judge wrote.

Representatives for the parties could not immediately be reached for comment Wednesday afternoon.

The NSCA is represented by Kenneth S. Kawabata, Tony J. Ellrod, Brandon K. Braga and David Bederman of Manning & Kass Ellrod Ramirez Trester LLP and James D. Nguyen, Sean M. Sullivan and Diana Palacios of Davis Wright Tremaine LLP.

CrossFit is represented by Daniel Scott Schechter, David F. Kowalski, Blair Connelly, William O. Reckler and Paul A. Serritella of Latham & Watkins LLP, and Micha Danzig and Justin Nahama of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The case is CrossFit v. National Strength and Conditioning Association, case number 14-cv-01191, in the U.S. District Court for the Southern District of California.

--Additional reporting by Braden Campbell. Editing by Catherine Sum.